APPENDIX

Decision of Court of Appeals Denying Leave to Appeal to the Court of Appeals

NORTH SHORE UNIVERSITY HOSPITAL;
FLORENCE FINCKE, et al.,

Appellants,

vs.

STATE HUMAN RIGHTS APPEAL BOARD,
STATE DIVISION OF HUMAN RIGHTS, ESSIE MORRIS,

Respondents.

Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursement.

May 20, 1982

Decision of Appellate Division, Second Department, Denying Leave to Appeal to the Court of Appeals

Motion by petitioners for leave to appeal to the Court of Appeals from an order of this court, dated June 1, 1981, which confirmed respondent's State Human Rights Appeal Board, dated November 24, 1980, which order affirmed an order of the respondent State Division of Human Rights, dated July 27, 1980, which decision and order of this court were adhered to by order on reargument dated October 14, 1981.

Motion denied, without costs.

LAZER, J.P., MANGANO, GIBBONS & GULOTTA, JJ., concur.

February 4, 1982

Order of Appellate Division, Second Department, Adhering to Original Determination After Reargument

NORTH SHORE UNIVERSITY HOSPITAL et al.,

Petitioners,

v.

HUMAN RIGHTS APPEAL BOARD et al.,

Respondents.

Motion by petitioners (1) for reargument for review of the order of the respondent State Human Rights Appeal Board, dated November 24, 1980, which affirmed an order of the State Division of Human Rights, dated July 27, 1980, which was confirmed by order of this court, dated June 1, 1981, or in the alternative, (2) for leave to appeal to the Court of Appeals.

The motion having been granted insofar as it was for reargument by order, dated September 18, 1981, and the parties having been heard on October 14, 1918, after oral argument the court adheres to its original determination. HOPKINS, J. P. MANGANO, GULOTTA & MARGETT, JJ., concur.

October 16, 1981

Order of Affirmance of Appellate Division

Filed in the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 1, 1981

HON. JAMES D. HOPKINS,
Justice Presiding,
HON. GUY J. MANGANO,
HON. FRANK A. GULOTTA,
HON. CHARLES MARGETT.
Associate Justices

NORTH SHORE UNIVERSITY HOSPITAL *et al.*,

Petitioner,

v.

STATE HUMAN RIGHTS APPEAL BOARD *et al.*,

Respondents.

Original order and papers filed with proceedings instituted in this court.

A proceeding having been instituted in this court pursuant to section 298 of the Executive Law, by petition of North Shore University Hospital et al., verified December 23, 1980, to review an order of the respondent State Human Rights Appeal Board, dated November 24, 1980, which affirmed an order of the respondent State Division of Human Rights, dated July 27, 1980, which found that the petitioners had discriminated against complainant Essie Morris, by failing to accommodate her observance of the Sabbath

and by terminating her employment in violation of section 296 (subd 10) of the Executive Law; and The State Division of Human Rights, respondent and Essie Morris, respondent, having filed answers thereto;

Now, upon the said petition; the said answers; and upon all the papers filed herein; and the said proceeding having been submitted by Peter D. Stergios, Esq., of counsel for petitioners, submitted by Jerome H. Field, Esq., of counsel for respondents Essie Morris and *argued by* Sara Toll East, Esq., of counsel for respondent State Division of Human Rights; due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is unanimously.

ORDERED that the said order is hereby confirmed and the petition dismissed, without costs or disbursements.

Enter:

/s/ IRVING N. SELKIN
Clerk of the Appellate Division

Opinion of Appellate Division

JAMES D. HOPKINS, J.P.
GUY J. MANGANO
FRANK A. GULOTTA
CHARLES MARGETT, JJ.

NORTH SHORE UNIVERSITY HOSPITAL et al.,

Petitioners,

v.

STATE HUMAN RIGHTS APPEAL BOARD et al.,

Respondents.

Shea & Gould, New York, N.Y. (Peter D. Stergios of counsel; Howard B. Adler on the brief), for petitioners.

Jerome H. Field, Brooklyn, N.Y., for respondent Essie Morris.

Ann Thacher Anderson, New York, N.Y. (Sara Toll East of counsel), for respondent State Division of Human Rights.

Proceeding pursuant to section 298 of the Executive Law to review an order of the respondent State Human Rights Appeal Board, dated November 24, 1980, which affirmed an order of the respondent State Division of Human Rights, dated July 27, 1980, which found that the petitioners had discriminated against complainant Essie Morris, by failing to accommodate her observance of the Sabbath and by terminating her employment in violation of section 296 (subd 10) of the Executive Law.

Order confirmed and petition dismissed, without costs or disbursements.

The finding of the State Division of Human Rights, that petitioners placed the burden upon the complainant, Essie Morris, a Seventh Day Adventist, to find other workers who were willing to "swap" assignments with her in order to permit her to observe her Sabbath, was supported by substantial evidence appearing on the record considered as a whole (*300 Gramatan Ave. Assoc.* v. *State Div. of Human Rights*, 45 NY2d 176). As noted by Mr. Justice SIMONS, in his dissenting opinion in *State Div. of Human Rights* v. *Genessee Hosp.* (68 AD2d 692, 701, 703 revd *sub nom Matter of Genessee Hosp.* v. *State Div of Human Rights*, 50 NY2d 917, on the dissenting opn of the Appellate Division insofar as it relates to the finding of discrimination) "an employer has an affirmative duty to make reasonable attempts to accommodate [the known religious beliefs of] its employees or to prove that such efforts would be unavailing * * * [An employee] should not [be] forced to rely upon the good will of her coworkers or her powers of persuasion, else be relegated to choosing between her religious beliefs and her employment."

Furthermore, petitioners did not meet their burden of proving that they were exempt from complying with the provisions of section 296 (subd 10) of the Executive Law on any of the grounds set forth in paragraphs (b) and (c) thereof.

We have considered petitioners' remaining contentions and find them to be without merit.

HOPKINS, J.P., MANGANO, GULOTTA and MARGETT, JJ., concur.

June 1, 1981

Order of State Human Rights Appeal Board

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD
Case No. E-C-44227-76E
APPEAL No. 5997
Argued: Nov. 16, 1979

STATE DIVISION OF HUMAN RIGHTS on the complaint of ESSIE MORRIS, COMPLAINANT-RESPONDENT

vs.

NORTH SHORE UNIVERSITY HOSPITAL, FLORENCE FINCKE, Assistant Director, Maternal Child Health,

Respondent-Appellant

Presiding:

HONORABLE RICHARD WONG

Appearances:

Jack Cusack, Personnel Administrator, on behalf of Respondent-Appellant.

Peter D. Stergois, Esq., on behalf of Respondent-Appellant.

Marc Reston, Esq., on behalf of Respondent-Appellant.

Essie Morris, Complainant-Respondent.

Jerome H. Field, Esq., on behalf of Complainant-Respondent.

Sara Toll East, Esq., on behalf of State Division of Human Rights.

Order of State Human Rights Appeal Board

The above-entitled appeal having been timely filed with this Board, and the Board having reviewed and considered the entire record on appeal herein, and the Board having discharged its narrowly prescribed review function pursuant to Section 297-a(7) of the Human Rights Law as construed by the Court of Appeals in *300 Gramatan Avenue Associates* v. *State Division of Human Rights*, 45 N.Y.2d 176, and

A majority of the Board having decided that the Order appealed from herein is supported by substantial evidence on the record taken as a whole, it is

ORDERED that the Decision and Order of the Commissioner of the State Division of Human Rights be and the same hereby is in all respects affirmed.

STATE HUMAN RIGHTS APPEAL BOARD

By /s/ IRMA VIDAL SANTAELLA
Irma Vidal Santaella
Chairman

Dated and Mailed: November 24, 1980

DISTRIBUTION LIST

RESPONDENT-APPELLANT
NORTH SHORE UNIVERSITY HOSPITAL
300 Community Drive

Manhasset, New York, 11030
Att: Ms. Florence Fincke
Mr. Jack Cusack, Personnel Administrator

Ms. Florence Fincke, Assistant Director
Maternal Child Health
North Shore University Hospital
300 Community Drive
Manhasset, New York 11030

Shea, Gould, Climenko & Casey, Esqs.
330 Madison Avenue
New York, New York 10017
Att: Marc T. Reston, Esq.
Att: Peter Stergios, Esq.

Complainant-Respondent
Ms. Essie Morris
178-47 Grandall Avenue
Springfield Gardens, New York 11434

Jerome H. Field, Esq.
187-15 Linden Boulevard
St. Albans, New York 11230

Dohr.
Commissioner Werner Kramarsky
State Division of Human Rights
2 World Trade Center
New York, N.Y. 10047

Ann T. Anderson, Esq.
General Counsel
State Division of Human Rights
2 World Trade Center
New York, N.Y. 10047
Att: Sara Toll East, Esq.

Hon. Robert Abrams
Attorney General
2 World Trade Center
New York, New York 10047

Notice of Order After Hearing of the Commissioner of the State Division of Human Rights

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS
Case No. (S) E-C-44227-76E

STATE DIVISION OF HUMAN RIGHTS on the complaint(s) of
ESSIE MORRIS,

Complainant,

—against—

NORTH SHORE UNIVERSITY HOSPITAL; FLORENCE FINCKE, ASSISTANT DIRECTOR, MATERNAL CHILD HEALTH,

Respondents.

PLEASE TAKE NOTICE that the within is a true copy of an Order issued herein by Werner H. Kramarsky, Commissioner of the State Division of Human Rights, after a hearing held before Administrative Law Judge Amos Carnegie, Esq. In accordance with the Division's Rules of Practice, copies of this Order have been filed in the offices maintained by the Division at 2 World Trade Center, New York, New York 10047, and at 183 Fulton Avenue, Hempstead, New York 11550. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that in accordance with Section 297-a of the New York State Human Rights Law, any party to this proceeding may appeal this Order to the State Human Rights Appeal Board by filing with the Board a written notice of appeal within fifteen (15) days after service of this Order. The notice of appeal must be filed

by mail or in person at the office of the State Human Rights Appeal Board, Room 8234, 2 World Trade Center, New York, New York 10047. DO NOT FILE THE NOTICE OF APPEAL WITH THE STATE DIVISION OF HUMAN RIGHTS. The Division and the Board are separate agencies. A notice of appeal delivered to or received by the Division, or any agency other than the Board, shall be deemed improperly filed and shall be dismissed by the Board.

Dated: July 12, 1979
New York, New York

STATE DIVISION OF HUMAN RIGHTS

/S/ WERNER H. KRAMARSKY
Commissioner

To:

MS. ESSIE MORRIS
178-47 Crandall Avenue
Springfield Gardens, New York 11434

NORTH SHORE UNIVERSITY HOSPITAL
300 Community Drive
Manhasset, New York 11030
Attention Ms. Florence Fincke

MS. FLORENCE FINCKE, Assistant Director
Maternal Child Health
North Shore University Hospital
300 Community Drive
Manhasset, New York 11030

JEROME H. FIELD, Esq.
187-15 Linden Boulevard
St. Albans, New York 11230

Notice of Order After Hearing

SHEA, GOULD, CLIMENKO & CASEY, Esqs.
THOMAS A. ANDREWS, Esq., of Counsel
330 Madison Avenue
New York, New York 10017

ANN THACHER ANDERSON, Esq., General Counsel
HERBERT HERSKOWITZ, Esq., of Counsel
State Division of Human Rights
2 World Trade Center
New York, New York 10047

HON. ROBERT ABRAMS
Attorney General
2 World Trade Center
New York, New York 10047

Proceedings

STATE OF NEW YORK: EXECUTIVE DEPARTMENT

STATE DIVISON OF HUMAN RIGHTS

CASE NO. (S)E-C-44227-76E

STATE DIVISION OF HUMAN RIGHTS

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on the complaint(s) of

ESSIE MORRIS,

Complainant,

—against—

NORTH SHORE UNIVERSITY HOSPITAL; FLORENCE FINCKE, ASSISTANT DIRECTOR, MATERNAL CHILD HEALTH,

Respondents.

On the 3rd day of September, 1976, the above-named Complainant filed a verified complaint, hereinafter amended, with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondents with an unlawful discriminatory practice relating to employment, in violation of the Human Rights Law, Article 15, of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaint and that probable cause existed to believe that Respondents had engaged in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for hearing before Amos Carnegie, Esq., an Administrative Law Judge of the Division. The hearing was held on July 25, 1977, September 28, 1977, March 9, 1978 and May 10, 1978.

Proceedings

Complainant and Respondents appeared at the hearing. Complainant was represented by Jerome H. Field, Esq. Respondents were represented by Shea, Gould, Climenko & Casey, Esqs., by Thomas A. Andrews, Esq., of Counsel. The Division was represented by Beverly Gross, Esq., then General Counsel, by Daniel Campbell, Esq., of Counsel.

The final transcript was received by the Division June 1, 1978.

FINDINGS OF FACT

1. Complainant Essie Morris has been a member of the Seventh Day Adventist Church since July, 1964.

2. Complainant, a nurse's aide, began working for Respondent North Shore University Hospital (hereinafter "North Shore") in August, 1967. She was told by Ms. Swenson, the person who interviewed her for the job that they would try to accomodate her by allowing her to be off on her Sabbath.

3. For approximately nine years, Complainant was usually able to exchange days with co-workers Elaine Gordon and Elsie Hughes who would work for Complainant on Fridays so that Complainant could observe her Sabbath from sundown Friday to sundown Saturday.

4. Complainant worked the night shift and requested to be off on Thursdays and Fridays. She was willing to work Saturday nights, Sunday nights, and any other day or night so long as she had Friday nights off, but the other workers in her area began to request Thursday and Fridays, and so "the problem really began."

5. Elsie Hughes who had switched Fridays with Complainant became sick and thereafter retired from the job.

Elaine Gordon had a particular reason for wanting Friday nights off and consequently Complainant was no longer able to switch with her.

6. Complainant asked Respondent Florence Fincke, Assistant Director of Nursing, Maternal and Child Health, her supervisor, if she could have Fridays off. She stated that she would be willing to work Saturday and Sunday nights to make up the time. Ms. Finke, after talking with the hospital administration, informed Complainant that her request could not be granted. Complainant then told Patricia Melis in the personnel department about the problem she was having. Patricia Melis advised Complainant that she called Respondent North Shore's lawyer who said Complainant could not have Fridays off.

7. On or about August 5, 1976, Complainant gave notice to Respondent North Shore that she wished to observe her Sabbath in the following memorandum: "The purpose of this memorandum is to state and make very clear my reason for not coming in to work on Friday nights and Saturday days. The *reason* is, from *sunset Friday* to *sunset Saturday* I am *worshipping* my GOD, and keeping his commandments. For this reason do I not come in to work on Friday nights and Saturday days. The Friday nights and Saturday days I have not been there up until this date can be attributed to the reason given above. However, I am willing to compromise and work another day or days in place of my *SABBATH*."

8. In addition, S.W. Stovall, Executive Secretary of Northeastern Conference of Seventh Day Adventists, wrote a letter to Respondent North Shore on August 11, 1976, in which he stated in Complainant's behalf that: "Mrs. Essie Morris, an employee of your hospital, is an active, practic-

ing Seventh-day Adventist. She holds membership in the Jamaica Seventh-day Adventist Church, New York.

One of the cardinal doctrines of the Seventh-day Adventist Church is the command to observe the seventh-day Sabbath: Saturday (Exodus 20). Sabbath is observed from sundown Friday night to sundown Saturday night (Genesis 1). Mrs. Morris adheres to the teachings of the Bible as found in the Seventh-day Adventist Church and wishes to be a conscientious Sabbath keeper and not work during the Sabbath hours. It is my understanding that she had given nine satisfactory years of service. She is willing to make up the time off for Sabbath by working any other day or night, including sundays."

9. The record establishes that Respondent North Shore had regularly accommodated employees who desire to attend school by transferring them to another shift. Respondent Fincke testified that "we do make provisions to transfer them to another shift where there is an opening. If they want to go to school in the evening, we transfer them to nights or days. Usually we try to work it out with the employees if they are going to further their education." In regard to Complainant's requirement that she be off on Fridays in order to follow the dictates of her religion, Respondent North Shore placed the burden upon Complainant to find a fellow worker to swap her Fridays with, and when Complainant are no longer able to find a worker to swap with Respondent North Shore made no bona fide effort to accommodate Complainant.

10. Respondent North Shore has three shifts. The day shift is 8 a.m. to 4 p.m., the evening shift is 4 p.m. to 12 midnight, and the night shift is 12 midnight to 8 a.m. In order to observe her Sabbath, there were four shifts a week

that Complainant could not work: "4 to 12 on Friday, 12 to 8 on Saturday, 8 to 4 on Saturday and 4 to 12 on Saturday."

11. Respondent North Shore employs approximately 100 nurse's aides. Nurse's aides who work in the clinics generally work the day shift, 8 a.m. to 4 p.m., and they are off on Saturdays and Sundays.

12. On September 7, 1976, Complainant was terminated by Phyllis Kowakski, Associate Director of Nursing. The following basis for termination was given: "On August 27th you were given a Warning Notice in regards to not reporting for work. You did not appear for work on Friday, September 3, 1976, therefore I am terminating you as of today."

13. Respondent North Shore, Respondent Florence Fincke and Phyllis Kowakski discriminated against Complainant Essie Morris by failing to accommodate her as a Sabbath observer and by terminating her in violation of the Human Rights Law.

14. Complainant suffered monetary damage as the result of such discriminatory acts.

OPINION

Respondents have not established that the accommodation of Complainant with respect to scheduling her hours so that she would be off on her Sabbath would have caused undue economic hardship. The fact that other employees may have resented such accommodation for Complainant is not controlling. It is clear from the record that Respondent did not make a real bona fide effort to rearrange Complainant's work so that she would be off on her Sabbath.

DECISION

On the basis of the foregoing, I find that Respondents North Shore University Hospital and Florence Fincke discriminated against Complainant by failing to accommodate her observance of her Sabbath, and terminated her employment, in violation of the Human Rights Law.

On the basis of the foregoing, I further find that the awarding of compensatory damages to the aggrieved Complainant will effectuate the purposes of the Human Rights Law.

ORDER

Upon the foregoing Findings of Fact and pursuant to the provisions of the Human Rights Law, it is hereby

ORDERED, that Respondents, their agents, servants, employees, representatives, successors and assigns shall cease and desist from maintaining a policy which refuses to accommodate Sabbath observers, thereby denying them employment, or otherwise discriminates against such Sabbath observers in the terms, conditions and privileges of employment because of the observance of their Sabbath; and it is further

ORDERED, that the Respondents, their agents, servants, employees, representatives, successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

1. Respondent North Shore University Hospital shall forthwith offer to re-employ Essie Morris as a nurse's aide. Complainant shall be allowed ten (10) business days within which to accept or reject said offer of employment.

2. Respondent North Shore University Hospital shall schedule Complainant's work shifts so that she will not have to work on her Sabbath.

3. The Respondent North Shore University Hospital shall, within thirty (30) days from the date hereof, pay to the Complainant Essie Morris, a sum of money based on what she would have earned had she not been terminated on September 7, 1976 to the date the Complainant accepts or rejects the offer of re-employment, less the standard payroll deduction and less any wages she may have earned during this period. Said payment shall bear interest at the rate of six percent (6%) per annum and the interest shall be computed from a reasonable intermediate date, in accordance with Section 5001 (b) of the CPLR. Said intermediate date shall be the date computed by taking the middle date from the date that Respondent terminated Complainant, September 7, 1976, to the date that the Complainant accepts or rejects the Complainant's offer. Respondent shall furnish proof of payment within ten (10) business days thereof to the State Division of Human Rights, 2 World Trade Center, New York, New York 10047, Attention Ann Thacher Anderson Esq., General Counsel.

4. Respondent North Shore University Hospital shall grant the Complainant all the rights, privileges, benefits, seniority and pay raises she would have received or been entitled to receive had she not been terminated on the date specified in paragraph (3) above.

5. Respondent shall instruct, in writing, all of its appointing personnel, supervisory employees, agents and officers that no person may be fired or barred from employment and that no retaliatory action may be taken against any employee

who refuses to work on his or her Sabbath or other holy days in accordance with the requirements of his or her religion.

6. Respondent shall make available to the duly-authorized representatives of this Division such information and documents as may be necessary for the Division to ascertain whether there is compliance with this Order.

DATED: Jul 27 1979
New York, New York

STATE DIVISION OF HUMAN RIGHTS

/s/ WERBER H. KRAMARSKY
Werber H. Kramarsky
Commissioner

Notice of Appeal to the Supreme Court of the United States

COURT OF APPEALS

OF THE STATE OF NEW YORK

Motion No. 396

NORTH SHORE UNIVERSITY HOSPITAL; FLORENCE FINCKE, ASSISTANT DIRECTOR, MATERNAL CHILD HEALTH CARE,

Appellants,

v.

STATE HUMAN RIGHTS APPEAL BOARD, STATE DIVISION OF HUMAN RIGHTS; ESSIE MORRIS,

Appellees.

Notice is hereby given that North Shore University Hospital and Florence Fincke, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York, denying appellant's motion for leave to appeal, entered in this action on May 20, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

SHEA & GOULD
Counsel for Appellants
330 Madison Avenue
New York, New York 10017
(212) 370-8000

Notice of Appeal to the Supreme Court of the United States

To:

STATE HUMAN RIGHTS APPEAL BOARD
2 World Trade Center
New York, New York 10047

ANN THACHER ARMSTRONG, General Counsel
State Division of Human Rights
2 World Trade Center
New York, New York 10047

JEROME H. FIELD, Esq.
Box 292, Midwood Station
Brooklyn, New York 11236

Affidavit of Mailing

COURT OF APPEALS OF
THE STATE OF NEW YORK } ss

REBECCA M. MCCABE, being duly sworn, deposes and says: that deponent is in the employ of Shea & Gould, attorneys for . Appellants herein, is over 18 years of age, is not a party to this action and resides at 12 Parliament Dr., New City, New York 10956. On the 12th day of August , 1982, deponent served the within Notice of Appeal to the Supreme Court of the United States on the following at the address designated by them for that purpose:

STATE HUMAN RIGHTS APPEAL BOARD
2 World Trade Center
New York, New York 10047

ANN THACHER ARMSTRONG, General Counsel
State Division of Human Rights
2 World Trade Center
New York, New York 10047

JEROME H. FIELD, Esq.
Box 292, Midwood Station
Brooklyn, New York 11236

by depositing a true and correct copy of the same, properly enclosed in a postpaid wrapper in the official depository maintained and exclusively controlled by the United States Government at 330 Madison Avenue, New York, New York 10017.

/s/ REBECCA MCCABE
Rebecca McCabe

Sworn to before me this 12th day of August , 1982.

/s/ EVELYN PERSICO
Notary Public
No. 4725752
Qualified in New York County
Commission Expires March 30, 1984